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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER MENA,

Defendant and Appellant.

B263469

(Los Angeles County  
Super. Ct. No. VA079744)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Michael A. Cowell, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner and Richard B. Lennon,  
under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Javier Mena was convicted by jury of one count of possession of a controlled substance while armed with a firearm. (Health & Saf. Code, § 11370.1, subd. (a).) He was sentenced under the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d))<sup>1</sup> to a term of 25 years to life. In 2005, we affirmed the judgment of conviction. (*People v. Mena* (2005) 133 Cal.App.4th 702 (*Mena I*).

In 2014, appellant filed a petition for resentencing under the Three Strikes Reform Act of 2012 (the Act). (§ 1170.126.) “‘The Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. . . . The Act also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. [Citation.]’ [Citation.]” (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 791.) “Using a firearm or being armed with a firearm during the commission of a current offense is a disqualifying factor listed in section 667, subdivision (e)(2)(C)(iii).” (*Id.* at p. 792.) The trial court thus denied appellant’s petition on the ground that his conviction for possession of a controlled substance while armed with a firearm rendered him ineligible for resentencing under sections 1170.126, subdivision (e)(2), and 667, subdivision (e)(2)(C)(iii). Appellant timely appealed.

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<sup>1</sup> Unspecified statutory references will be to the Penal Code.

After review of the record, appellant’s court-appointed counsel filed an opening brief asking this court to review the record independently pursuant to the holding of *People v. Wende* (1979) 25 Cal.3d 436, 441 (*Wende*). Appellant filed a supplemental brief, raising several issues. However, all but one of the issues appellant raises do not concern his petition for resentencing, but instead are matters that should have been or were raised in his direct appeal.

Appellant contends that he did not have notice that the case would be charged as a third strike and that the trial court erred in dismissing a firearm allegation for his codefendant but not for him. He also challenges the trial court’s reliance on a juvenile conviction. Appellant has shown no justification for failing to raise these issues in his prior appeal. (See *People v. Johnson* (2016) 244 Cal.App.4th 384, 389, fn. 5 [“‘[W]here a criminal defendant could have raised an issue in a prior appeal, the appellate court need not entertain the issue in a subsequent appeal absent a showing of justification for the delay.’ [Citation.]”].)

Appellant challenges the jury instruction regarding possession of a firearm, an argument we considered and rejected in his direct appeal.<sup>2</sup> (See *Mena I, supra*, 133 Cal.App.4th at pp. 705-708.) Appellant’s ineffective assistance of counsel claim similarly concerns the firearm allegation. In *Mena I*, we declined to consider appellant’s ineffective assistance of counsel claim because we concluded there was no error and no reasonable likelihood the jury was misled. (*Id.* at p. 708, fn. 7.) “[T]he law-of-the-case doctrine “prevents the parties from seeking appellate reconsideration of an already decided issue in the same case absent some significant change in circumstances.” [Citation.] . . .’ [Citation.]” (*People v.*

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<sup>2</sup> Appellant also challenges the admission of gang evidence, an issue we considered and rejected in the unpublished portion of the opinion. (See *People v. Mena* (Oct. 20, 2005, B177713) [nonpub. opn.].)

*Vizcarra* (2015) 236 Cal.App.4th 422, 429.) There has been no significant change in circumstances that would require us to reconsider these claims.

The only claim appellant raises that is pertinent to his petition for resentencing is that the trial court was required to hold an evidentiary hearing in order to determine the extent of his possession of a firearm. We are not persuaded.

Some courts have held hearings to determine the extent of firearm possession in deciding a defendant's eligibility for resentencing.<sup>3</sup> However, those cases did not involve convictions under a statute that explicitly required a finding that the defendant was "armed with" a firearm, as appellant's did. (Health & Saf. Code, § 11370.1, subd. (a).) (See, e.g., *People v. White* (2016) 243 Cal.App.4th 1354, 1357 [felon in possession of a firearm]; *People v. Estrada* (2015) 243 Cal.App.4th 336, 339 [grand theft from a person]; *People v. Berry* (2015) 235 Cal.App.4th 1417, 1420 [possession of a fraudulent check and possession of a forged driver's license]; *People v. Hicks* (2014) 231 Cal.App.4th 275, 279 [felon in possession of a firearm].)

Unlike the defendants in the cases cited above, appellant was convicted of possession of a controlled substance "while armed with a loaded, operable firearm." (Health & Saf. Code, § 11370.1, subd. (a).) The Act disqualifies an inmate from resentencing eligibility where "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm" as set forth in section 667, subdivision (e)(2)(C)(iii). (§ 1170.126, subd. (e)(2).) Appellant therefore is facially ineligible for resentencing.

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<sup>3</sup> This generally is because "[a] defendant's 'mere possession' of a firearm or deadly weapon does not establish that the defendant was armed with the firearm or deadly weapon. [Citation.] Rather, the defendant was armed, and thus ineligible for resentencing, if he or she had the firearm or deadly weapon 'available for offensive or defensive use.' [Citation.]" (*People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458.)

We have independently reviewed the record and conclude that there are no arguable issues on appeal. (See *Wende, supra*, 25 Cal.3d at pp. 441–442; see also *Smith v. Robbins* (2000) 528 U.S. 259, 278-279 [upholding the *Wende* procedure].)

**DISPOSITION**

The order denying appellant’s petition for resentencing is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.